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Notes, Comments, Digests

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COMMENTS

Nuisances—Erection of Towers on Land Adjoining Airport.—[Pennsylvania] Defendant owned land adjoining the Harrisburg, Pennsylvania airport and—directly in the line of flight of airplanes using the airport—erected a skeleton tower made of wood about eight feet square and extending to a height of approximately 154 feet with numerous guy wires leading from the top to the ground. This tower fell and defendant immediately erected another one in its place, the second one extending to a height of 98 feet. The latter was destroyed by fire and defendant threatened to erect another tower. It was charged that the towers constituted public nuisances and that a new tower would menace and endanger the lives and property of the traveling public using the airport and the civil airway in the vicinity thereof. An injunction was sought against defendant. In defendant's answer it was alleged that aircraft trespassed upon the land in question to such an extent as to deprive defendant of reasonable use thereof and that the towers were erected to abate a nuisance created by the unlawful, illegal, incessant, disturbing, noisy and dangerous low flying over tenant houses and tilled lands by passenger planes and other heavy planes entering and leaving the airport. At the time suit was instituted the airport was privately owned and operated but prior to the decree it became the property of the Commonwealth of Pennsylvania. It was located on four civil airways maintained and supervised by both the state and federal governments and it was used in connection with interstate and intrastate flying. The court issued a permanent injunction restraining the defendant from erecting, causing or permitting to be erected any tower or structure for the purpose of interfering with the aeronautic approach to or departure from the airport on or along the civil airways of the Commonwealth. *Commonwealth of Pa. ex rel. Schnader* v. *Von Bestecki, et al.*[1]

The court gave only limited consideration to the question of the right of flight over defendant's property concluding that whatever that right might be, the evidence indicated that users of the airway were unreasonably annoying and disturbing defendant to such an extent as to amount to a private nuisance for which the defendant had a remedy at law or in equity. The court observed that defendant had not chosen to adopt such an orderly proceeding and instead had committed and had threatened to commit acts dangerous to the air traveling public, "spring gun" cases[2] being referred to in support of the determination that the towers complained of constituted public nuisances. At the same time the court purported not to pass upon the question of justification for attempted abatement of trespass or nuisance on the ground that such justification as a defense was not properly pleaded. It would seem that even if the question of justification had been at issue,

1. State of Pa., Court of Common Pleas, Dauphin County, March 15, 1937. 30 Pennsylvania District and County Reports 137, 235 CCH par. 1808; 1937 USAvR 1.

2. *Hydraulic Works Co.* v. *Orr*, 83 Pa. 332; *State* v. *Moore*, 31 Conn. 479, 83 Am. Dec. 159; *Simpson* v. *State*, 59 Ala. 1, 31 Am. Rep. 1.

the result in the case would have been the same, because of the dangerous nature of the means adopted by defendant for abatement.

The court hesitated to express itself on the right of flight question—apparently because it felt that defendant was being unreasonably interfered with by low flying. At the same time it concluded that "The erection of towers, and the resultant menace to the public traveling on the civil airways, constituted a public nuisance, the threatened recurrence of which may be enjoined by a court of equity." It therefore appears that the court assumed that there was a public right to fly over defendant's property and that its holding was premised upon interference with this public right.[3]

It was not necessary for the court to determine the exact minimum levels of lawful flight over defendant's property, although its opinion might have been strengthened if it had definitely concluded that there was a public right to fly in the proximity of the towers. Such a conclusion probably would have been supported by evidence concerning the public interests involved, the character of the use of defendant's property, and the extent of interference with such use by the type of flying complained of.[4] If this conclusion had been expressed the basis for the injunction would have been shown more clearly in view of the court's statement that "The tower is likely to distract the attention of the pilot causing him to pay more attention to the tower and give inadequate concentration to his airway;"[5] and the obvious fact that hazards would result to aircraft inadvertently operated below otherwise proper levels due to mechanical difficulties, low clouds or other circumstances.[6]

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3. Compare similar case of *Tucker* v. *United Air Lines, Inc. and the City of Iowa City,* State of Iowa, Dist. Ct. for Johnson County, September 14, 1935, 6 JOURNAL OF AIR LAW 622, and 7 JOURNAL OF AIR LAW 293, 1936 USAvR 10; Comment, 36 Columbia Law Review 483. See also *Hinman* v. *Pacific Air Transport,* 84 Fed. (2nd) 755, 1936 USAvR 1; Comment, 7 JOURNAL OF AIR LAW 624.

4. Compare *Smith* v. *New England Aircraft Company* (Mass.), 170 N. E. 385, 393; *Swetland* v. *Curtiss Airport Corporation,* 55 Fed. (2nd) 201, 203, 204; *Hinman* v. *Pacific Air Transport, supra; Tucker* v. *United Air Lines, Inc. and the City of Iowa City, supra.*

5. *State* v. *Moore, supra; People* v. *Eckerson,* 117 N. Y. S. 417 (excavation so close to highway as to render travel thereon dangerous); *Horr* v. *N. Y. N. H. & H. R. Co.* (Mass.), 78 N. E. 776 (mail bags piled so close to traveled portion of public highway as to scare horses). See also 45 C. J. 862, Sec. 287.

6. It has been held that navigators have a right to use banks of a stream temporarily in cases of peril or emergency. (45 C. J. 449, n. 51.) In *Rider* v. *White,* 65 N. Y. 54, a stranger, while traversing an unmarked highway, inadvertently passed over defendant's property and was injured by defendant's dog which defendant knew was vicious. Defendant held liable for the injury.

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